APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1501—August Term 1995

Argued: April 26, 1996 Decided: Nov. 6, 1996

Docket No. 95-7855

TRANSAERO, INC.

Plaintiff-Appellee,

v.

LA FUERZA AEREA BOLIVIANA, an
Instrumentality of the Republic of Bolivia,
a Foreign State,

Defendant-Appellant.

Before: VAN GRAAFEILAND, *Circuit Judge*,* and
CARTER, *District Judge*.**

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* The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996, and the appeal is being decided by the remaining two members of the panel, who are in agreement. See Local Rule § 0.14(b).

** The Honorable Robert L. Carter, United States District Judge for the Southern District of New York, sitting by designation.

VAN GRAAFEILAND, *Circuit Judge*:

Fuerza Aerea Boliviana ("BAF") appeals from an order of the United States District Court for the Eastern District of New York (Mishler, J.) denying its motion to vacate a default judgement in favor of Transaero, Inc. We dismiss the appeal for lack of appellate jurisdiction without prejudice to BAF's right to appeal from the final judgement when entered.

This action arises out of a credit agreement between BAF and Transaero entered into in May 1981. The agreement established an open account upon which BAF could purchase aviation equipment from Transaero. The agreement also provided that BAF would pay interest at 1.75% per month (21% per annum) on all purchases not paid within 120 days of shipment. Between 1981 and 1982 BAF's purchases resulted in a principal balance of $598,115.76 on the account. Although BAF paid $648,115.76 on the debt during the next four years, Transaero sued on September 8, 1988 to recover $983,696.60 allegedly owed to it for outstanding principal and interest.

BAF failed to answer the complaint or to appear at a scheduled default judgment hearing, and on April 28, 1989 the district court entered a default judgment in the amount requested. In 1991 Transaero registered and sought to enforce the judgment in the United States District Court for the District of Columbia. BAF appeared in the action and sought summary judgment opposing enforcement, arguing that there had been improper service of process in the Eastern District under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.). The court denied the motion on September 25, 1992. BAF appealed to the United States Court of Appeals for the District of Columbia Circuit.

While the appeal was pending, BAF moved under Rule 60(b) in the Eastern District to vacate the default judgement. Although BAF's principal argument was that the default judgement had been procured by fraud, its motion papers contained the following proposed reservation of issues:

> The Air Force [BAF] has appealed Judge Revercomb's opinion [to the D.C. Circuit]. See Exh. 19 (notice of appeal). The Air Force acknowledges that until overturned on its pending appeal, Judge Revercomb's opinion bars the Air Force from challenging the propriety of service under the [FSIA]. See *Huron Corp. v. Lincoln Co.*, 312 U.S. 183, 188-89 (1941) (judgment on appeal is still final judgement); *Petrella v. Siegel*, 843 F.2d 87, 90 (2d Cir. 1988) (judgment pending appeal entitled to res judicata effect); *United States v. NYSCO Laboratories, Inc.*, 318 F.2d 817 (2d Cir. 1963) (same). Although barred by res judicata from contesting it, the Air Force in no way waives these issues. In this, its first responsive pleading, the Air Force preserves its challenges to Transaero's improper service of process and this Court's lack of personal and subject-matter jurisdiction under the [FSIA] and the United States Constitution.

On August 12, 1993, the Eastern District denied BAF's motion to vacate the judgement and BAF then appealed to this Court. In *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994) ("*Transaero I*"), we upheld the Eastern District's decision, finding no abuse of discretion in the denial of BAF's claim of fraud on the court. Noting Transaero's failure to address BAF's claims regarding the district court's calculation of interest, we held that there remained two questions regarding "the accuracy of the interest calculation on which the award to Transaero was based."

Id. at 462-63. Accordingly, we remanded to the district court for consideration of the proper starting date for the running of interest and the correct interest rate to be used. BAF filed a Petition for Rehearing and asked among other things that this Court "hold its remand in abeyance, and thereby stay the mandate until the D.C. Circuit decided the pending appeal." BAF also raised a question regarding the termination of the accrual of interest under the contract.

While BAF's petition was pending, the Court of Appeals for the District of Columbia Circuit handed down a decision reversing Judge Revercomb. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994) ("*Transaero II*"), *cert. denied*, 115 S. Ct. 1101 (1995). The Court of Appeals held that the Eastern District lacked personal jurisdiction over BAF under the FSIA because, although service of the complaint complied with the FSIA provision for serving an agency or instrumentality of a foreign state (28 U.S.C. § 1608(b)), BAF was an alter ego of a foreign state and service upon it had to comply with the more stringent requirement of 28 U.S.C. § 1608(a). The Court therefore concluded that the entry of default judgement in the Eastern District was "void and unenforceable." *Id.* at 154. Transaero filed a Petition for Rehearing, a Suggestion for Rehearing In Banc, and a Petition for a Writ of Certiorari, all of which were denied.

After Transaero II, this Court sua sponte requested the parties to brief the issue of the preclusive effect of the D.C. Circuit's holding. With the parties' added wisdom in hand, we decided that

> whatever preclusive effect that decision [*Transaero II*] might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant BAF's petition for rehearing. That petition afforded BAF an opportunity to indicate "the points

> of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed. R. App. P. 40(a) . . . . [W]e have now pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any, may operate.

Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648, 650 (2d Cir. 1994) ("*Transaero III*"). We stated, however, that we were ruling "without expressing any views as to . . . the validity of Transaero's service upon BAF in initiating the Eastern District suit . . . [or] whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void." *Id.* All we did was broaden the remand to allow the district court to consider the proper ending date for the assessment of interest.

Following the case's return to the district court, BAF brought the Rule 60(b)(4) motion which led to this appeal, asserting that the default judgement was void for lack of proper service and that the ruling of the Court of Appeals for the District of Columbia Circuit was res judicata. The district court denied the motion and ordered that expedited discovery begin in preparation for a hearing to determine the interest rate and interest period to be used in calculating the award. BAF appealed and we granted a stay of the proceedings in the district court.

"Determinations of liability that leave unresolved questions of remedy ordinarily are not final. . . . The need to resolve a dispute and not routine question of interest . . . defeats finality." 15B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3915.2 at 271-74. Although a final decision may be entered if only "ministerial proceedings" remain, *id.* at 271, this is a narrow exception reserved for the case where an award can be executed after a simple arithmetic calculation or where there remains only some

other mechanical task to be performed. In the instant case, however, the appropriate interest rate and the interest period remain as disputed issues. The district court still must determine the proper period during which to assess interest and has ordered discovery in order to obtain Transaero's records of BAF's account for this purpose. Moreover, it is an open question whether Transaero is entitled to compound interest under the contract and applicable law. Because the district court has yet to rule on these issues, there has been no final judgment.

By its own terms, Rule 60(b) applies only to judgments that are final. Although a district court is vested with the power to revisit its decisions before the entry of final judgment and is free from the constraints of Rule 60 in so doing, see *Cohn v. United States*, 259 F.2d 371, 376 (6th Cir. 1958), the denial of a motion to effect such a reconsideration is immediately appealable only if the determination at issue falls within one of the narrow exceptions to the final judgment rule. The collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), is one of those exceptions, and BAF contends that it supports our appellate jurisdiction in the instant case. In Cohen, the Supreme Court stated that although most trial court decisions can be reviewed effectively on appeal from the final judgment, certain rights may be irreparably lost if immediate appeal is not permitted. *Id.* at 546. One such right is the right of immunity, i.e., the right not to be sued at all. See *Imbler v. Pachtman*, 424 U.S. 409, 417-20 (1976). BAF attempts to bring the instant case within the ambit of this immunity defense by arguing that "federal courts have appellate jurisdiction to hear an interlocutory appeal involving a foreign sovereign's amenability to suit—including questions of personal jurisdiction . . ." Appellant's Reply Brief at 3-4. This attempt must fall. "[T]o fall within the Cohen exception, an order must satisfy at least three conditions: It must

conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989) (internal quotation marks omitted). Because BAF's right not to be subject to a binding judgment may be effectively vindicated following final judgment, the denial of the claim of lack of jurisdiction is not an immediately appealable collateral order. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988).

It is unfortunate that dismissal of the appeal will cause additional delay and expense which eventually may prove to have been unnecessary. However, "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985).

The appeal is dismissed without prejudice to BAF's right to appeal from the final judgment when entered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of January one thousand nine hundred and ninety-seven.

Dkt No: 95-7855

TRANSAERO, INC.

Appellee

v.

LA FUERZA AEREA BOLIVIANA,

Appellant

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant La Fuerza Aerea.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal

and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
George Lange III, Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR,
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No: 88-2788

August 4, 1995

TRANSAERO, INC.

Plaintiff,

-against-

LA FUERZA AEREA BOLIVIANA,
an instrumentality of the
REPUBLIC OF BOLIVIA, a Foreign State,

Defendant.

MEMORANDUM OF DECISION AND ORDER

MISCHLER, District Judge

Defendant, La Fuerza Aera Boliviana ("the Air Force"), moves pursuant to Fed.R.Civ.P. 60(b)(4) to set aside the default judgment entered on April 28, 1989 and to dismiss the complaint solely because of the preclusive effect of the District of Columbia Circuit Court of Appeals' finding that this Court lacked personal jurisdiction. See *Transaero, Inc. v. La Fuerza Aera Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1101 (1995). Defendant also moves to stay all non-jurisdictional proceedings, pending the resolution of the motion to set aside the

default judgment. Plaintiff, Transaero, Inc. ("Transaero"), moves to modify the default judgment pursuant to the mandate issued by the Second Circuit Court of Appeals on March 27, 1995. See *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457 (2d Cir.), *reh'g. granted in part*, 38 F.3d 648 (2d Cir. 1994).

BACKGROUND

This case has a lengthy history and comes before us now in an unusual procedural context. Familiarity with this Court's Memoranda of Decision and Orders dated April 21, 1989 and August 12, 1993, the Second Circuit decisions *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457 (2d Cir. 1994) ("*Transaero I*") and *Transaero, Inc. v. La Fuerza Area Boliviana*, 38 F.3d 648 (2d Cir. 1994) ("*Transaero III*"), as well as the District of Columbia Circuit Court of Appeals decision *Transaero, Inc. v. La Fuerza Aereo Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 1101 (1995) ("*Transaero II*"), is assumed. However, due to the complicated nature of this case we will briefly recite the pertinent facts and procedural posture.

This case originally arose out of an alleged breach of a credit agreement entered into between Transaero, a supplier of aircraft parts, and the Air Force in May 1981. The credit agreement created an open account upon which the Air Force could make purchases from Transaero. The agreement required the Air Force to pay interest of 1 3/4% per month (21% per annum) on all purchases not paid within 120 days of shipment. From June 22, 1981 until April 14, 1982, the Air Force ordered and accepted delivery of certain aviation equipment and thereby accumulated a principal balance of $598,115.76.

On or about September 8, 1988 Transaero filed a verified complaint seeking $983,696.60 in damages from the Air Force for: (1) "goods sold and delivered and accrued inter-

est on the unpaid balance"; (2) "an account stated"; (3) "breach of the Finance Agreement"; (4) "interest accruing on the unpaid balance of $598,115.76 for 86 months". The Air Force failed to serve or file an answer or enter an appearance.

Subsequently, Transaero moved for a default judgement. On March 30, 1989, we held a hearing on Transaero's motion for a default judgment. Despite receiving adequate notice, the Air Force failed to appear. In a Memorandum of Decision and Order dated April 21, 1989, we granted Transaero's motion for default judgment finding that: (1) the summons and complaint were properly served upon the Air Force in accordance with 28 U.S.C. § 2608(b)(3)(B); (2) the Air Force had adequate notice of the hearing, but failed to enter an appearance; (3) the complaint stated a cause of action based on breach of contract for the Air Force's failure to pay amounts due and owing for the purchase and delivery of aviation equipment; (4) the Air Force was not entitled to Sovereign Immunity under the foreign Sovereign Immunities Act (FSIA) because the activity of purchasing aviation equipment fell under the purview of the "commercial activities" exception to the FSIA, 28 U.S.C. § 1605(a)(2); and (5) Transaero's claim was supported by the proof submitted. The Clerk of the court entered the default judgment on April 28, 1989.

In 1991, Transaero, in order to enforce the judgment, registered the default judgment in the district court for the District of Columbia under 28 U.S.C. § 1963 (Supp. IV 1992) and served a set of interrogatories under Fed.R.Civ.P. 69. The Air Force entered an appearance and collaterally attacked this Court's default judgment, arguing that the rendering court lacked personal jurisdiction. Specifically, they sought summary judgment to quash the interrogatories and dismiss the proceedings on the ground that the Air Force

had not been served in compliance with § 1608(a) of the FSIA.

The late Judge Revercomb of the District Court for the District of Columbia denied the summary judgment motion in an order dated September 25, 1992. In that order, the court found: (1) that the Air Force was served pursuant to § 1608(b) of the FSIA; (2) that the Air Force received actual notice of the lawsuit; and (3) that the Air Force was notified by mail of this Court's hearing on Transaero's motion for default judgment. Judge Revercomb then held, as a matter of law, agreeing with this Court, that the Air Force was an "agency or instrumentality" of the Republic of Bolivia and, thus, that service under § 1608(b) of the FSIA was proper. The Air Force then immediately appealed the interlocutory ruling by Judge Revercomb to the District of Columbia Circuit Court of Appeals. See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C.Cir. 1991) (denial of claim of sovereign immunity subject to interlocutory appeal under ambit of "collateral order doctrine").

While the D.C. Circuit appeal was pending, the Air Force's new counsel, Williams & Connolly, entered an appearance in the Eastern District of New York, on May 10, 1993, and filed a Fed.R.Civ.P. 60(b) motion to set aside the default judgment. The Air Force argued to vacate the default judgement because the sworn affidavit executed by Transaero's counsel allegedly contained numerous misrepresentations of law and fact which constituted a fraud upon this Court. The Air Force also challenged the subject matter jurisdiction of this Court to enter the default judgment. We denied the Rule 60(b) motion on August 12, 1993 and the Air Force appealed that ruling to the Second Circuit.

On May 19, 1994 the Second Circuit affirmed our denial of the rule 60(b) motion. *Transaero I*, 24 F.3d 457 (2d Cir. 1994). The Second Circuit rejected the claim of fraud on

the court and the claim of lack of subject matter jurisdiction, holding that this Court did not abuse its discretion in denying the Air Force's application to set aside the default judgment under Rule 60(b) and remanded for the limited purpose of re-examining the mathematical accuracy of the award to Transaero.

On July 6, 1994, the Air Force filed a petition for rehearing with the Second Circuit. The petition primarily contended that the remand should include the consideration of the proper ending date for the running of interest. The Air Force also urged that the Second Circuit stay their mandate until the jurisdictional challenges have been adjudicated in the D.C. Circuit.

On July 29, 1994, while the petition for rehearing was pending in the Second Circuit, the D.C. Circuit decided the appeal from Judge Revercomb's ruling and reversed. *Transaero II*, 30 F.3d 148 (D.C. Cir. 1994). By a divided vote, the D.C. Circuit ruled that the air Force is a "foreign state" rather than an "agency or instrumentality of a foreign state" for purposes of service of process under the FSIA. Thus, although service may have been sufficient under § 1608(b), applicable to service on an agency or instrumentality of a foreign state, the D.C. Circuit ruled that service was not properly accomplished pursuant § 1608(a), applicable to service on a foreign state. The court concluded that the "Eastern District of New York lacked personal jurisdiction, and the default judgment registered in the District of Columbia was therefore void and unenforceable." *Id.* at 154. The Court then reversed and remanded with directions to dismiss the proceedings. A petition for rehearing with a suggestion for rehearing in banc was denied on September 15, 1994.

The Second Circuit, in light of the D.C. Circuit's decision and as part of the petition for rehearing, "then invited the parties' views as to whether the default judgment should

now be vacated." *Transaero III*, 38 F.3d at 650. On October 19, 1994 the Second Circuit denied the petition for rehearing on those grounds. After noting that the parties seemed to have flip-flopped their respective positions on the preclusive effect of the action in the District of Columbia, the Second Circuit ruled that "whatever preclusive effect the decision might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant [the Air Force's] petition for rehearing." *Id.* They further explained that there was then "pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any may operate." *Id.* They did, however, grant the petition for the limited purpose of broadening the remand to include consideration of the cessation of interest. The mandate was stayed until March 27, 1995.

DISCUSSION

We are now in the peculiar procedural posture whereby the District of Columbia Circuit Court of Appeals, in a collateral attack, has held that this Court lacked personal jurisdiction and decided that the default judgment registered in the District of Columbia was void and unenforceable, while the Second Circuit, in a direct attack, has affirmed the default judgment and remanded for the limited purpose of assessing the mathematical accuracy of the default award. Judge Mikva astutely noted in his dissent in *Transaero II* that "we [the D.C. Circuit] tell the parties that the statute compels one result; federal courts in another jurisdiction [the Second Circuit] tell the same parties that the statute compels the opposite result. Between us, we have thoroughly muddled the law." *Transaero II*, 30 F.3d at 155 (dissent).

As would be expected, the Air Force contends that we are bound by what they deem to be a successful collateral challenge to the personal jurisdiction of this Court over the defendant in the default proceeding. They assert that the

D.C. Circuit's ruling that the Eastern District of New York lacked personal jurisdiction is *res judicata* on the issue and we must abide by it. Transaero, on the other hand, argues that we are bound by the Second Circuit mandate remanding the case for the limited purpose of deciding the mathematical accuracy of the default award. We now attempt to "unmuddle" the law.

THE AIR FORCE'S RULE 60(B) MOTION

Based on the D.C. Circuit decision the Air Force now moves pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the default judgment as void. Subsection four of Rule 60(b) is unique because relief is not discretionary if the judgment is void and a meritorious defense is not necessary. *Covington Industries, Inc. v. Resintex A.G.*, 629 F.2d 730, 733 n.3 (2d Cir. 1980). Thus, the only issue to decide is whether this Court's default judgment is void in light of the D.C. Circuit's decision. The Air Force argues that the D.C. Circuit's holding that the 1989 default judgment "registered in the District of Columbia was therefore void and unenforceable," *Transaero II*, 30 F.3d at 154, is owed preclusive effect in this Court and dictates that the complaint be dismissed. the Air Force further asserts that "[t]he only possible basis for refusing to give preclusive effect to the District of Columbia Circuit's judgment is that it lacked jurisdiction to decide the issue in the first place." Memorandum of Law in Support of Motion to Set Aside Judgment and Dismiss the Complaint at 7.

The issue then is whether the Air Force's Notice of Appearance in the Eastern District of New York, Rule 60(b) motion, appeal to the Second Circuit and petition for rehearing constituted an appearance which waived any objection to personal jurisdiction and barred any collateral attack. As discussed below, we find that the aforementioned actions taken by the Air Force constitute such an appearance.

Waiver of Personal Jurisdiction

The requirement of personal jurisdiction represents an individual right and therefore may be waived. *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105 (1982). "A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Id.* at 703, 102 S.Ct. at 2105. A defendant's actions may amount to a legal submission to the jurisdiction of the court, whether voluntary or not. *Id.* at 704-05, 102 S.Ct. at 2105.

The issue of waiver of personal jurisdiction is generally governed by Rule 12 of the Federal Rules of civil Procedure. Rule 12(b) states, in pertinent part, as follows:

> Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto is one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person, . . . (4) insufficiency of process, (5) insufficiency of service of process . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted . . . .

Fed.R.Civ.P. 12(b). "Under Rule 12(h)(1), if one of these defenses is not promptly asserted by motion or in the responsive pleading, it is waived." *Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092 (2d Cir. 1990). Rule 12(h)(1) states, in pertinent part, that "[a] defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment made thereof

permitted by Rule 15(a) to be made as a matter of course." Fed.R.Civ.P. 12(h)(1).

"Thus, the message conveyed by the present version of Rule 12(h)(1) seems quite clear. It advises a litigant to exercise great diligence in challenging personal jurisdiction, venue, or service of process. If he wishes to raise any of these defenses he must do so at the time he makes his first significant defensive move—whether it be by way of a Rule 12 motion or a responsive pleading." Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1391, at 752 (footnote omitted).

As noted above, after the final entry of default judgment issued by this Court, the Air Force filed a notice of appearance in the Eastern District of New York and a Fed.R.Civ. P. 60(b) motion attacking the default judgment. This court denied the motion and the Air Force appealed the decision to the Second Circuit. At no time during these appearances did the Air Force object to the lack of personal jurisdiction.

The Air Force's Rule 60(b) motion to vacate the default judgment was its first significant defensive move. The failure to object to lack of personal jurisdiction or insufficient service of process resulted in the waiver of the objection. The conduct relied upon to find waiver can occur after entry of default. See *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991). Several courts have found that a post-default judgment motion should be treated as an initial rule 12 motion to dismiss for purposes of waiver under Rule 12(h)(1). See *Lowery*, 924 F.2d at 733 (citing *J. Slotnick Co. v. Clemco Industries*, 127 F.R.D. 435, 440-41 (D.Mass. 1989) (failure to raise challenge to service in first defensive move after entry of default results in waiver of that defense under Rule 12(h)(1)); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 405 (7th Cir. 1986) (objection to service of process waived for

not asserting it in first Rule 60(b) motion to vacate default judgment for lack of personal jurisdiction); *O'Brien v. Sage Group, Inc.*, 141 F.R.D. 81, 83 (N.D.Ill. 1992), *aff'g.*, 998 F.2d 1394 (7th Cir. 1993) (defendant's abandonment of their objection to validity of service in their Rule 55(c) motion to vacate default judgment resulted in waiver of right to contest validity of service, and with it all objections to personal service); *Lichtenstein v. Jewelart, Inc.*, 95 F.R.D. 511, 513 (E.D.N.Y. 1982) (determination of a Rule 55(c) motion based on lack of jurisdiction over the defendant can and should be treated as initial motion to dismiss).

It is important to note that only after the Air Force's collateral attack was denied in the D.C. District Court, did the Air Force turn to this Court in the Eastern District of New York for relief on grounds other than personal jurisdiction and sufficiency of process. By appearing to contest the subject matter and to argue that there was a fraud on the court the air Force consented to the jurisdiction of this Court to hear the objections. It is axiomatic that a movant consents to personal jurisdiction, unless the movant is objecting to personal jurisdiction. Moreover, the air Force appealed the adverse ruling of this Court to the Second Circuit. The Air Force's action is consistent with consenting to the court's personal jurisdiction.

In other words, if we had granted the Rule 60(b) motion the Air Force could not then argue that this Court lacked the personal jurisdiction to hear the merits or if the Air Force had won its appeal, and the default judgment was vacated, the Air Force would have been deemed to have waived personal jurisdiction for the remand on the merits. Thus, the failure to object to lack of personal jurisdiction in the Rule 60(b) motion and in the appeal thereof resulted in a waiver of those objections. To hold otherwise would allow the defendant to assert jurisdictional and other objections at

different stages of litigation and would violate both the letter and spirit of Rule 12(h)(1).

Collateral Attack

There is no doubt that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. at 706, 102 S.Ct. at 2106 (citing *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517 (1931)); see also *Covington Industries, Inc. v. Resintex A.G.*, 629 F.2d 730, 732 (2d Cir. 1980); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987). This is true whether the judgment was issued by a tribunal within the enforcing court's jurisdiction or by a court of a foreign jurisdiction, unless barred by the principles of *res judicata*. See *Covington Industries*, 629 F.2d at 732 (citation omitted).

"On the other hand, if the defendant appears in the original action and contests the jurisdiction of the court over either the person or the subject matter . . . and that issue is decided against him, . . . the default judgement is not subject to collateral attack for lack of jurisdiction of either person or subject matter. Nor is it where he appears but fails to contest jurisdiction." *Moore's Federal Practice* ¶ 60.25[2], at 60-234 (emphasis added) (footnotes omitted); see *Baldwin*, 283 U.S. at 525, 51 S.Ct. at 518; see also *Moore's Federal Practice* ¶ 55.09, at 55-64.

Thus, a defendant faced with a lawsuit who believes the court lacks personal jurisdiction has basically two choices. the defendant can appear, challenge personal jurisdiction and defend the suit on the merits. This will preserve the jurisdictional objection for direct appeal. Or the defendant can remain entirely aloof from the original proceeding and attack the default judgment collaterally. However, if it is later

determined that the rendering court possessed proper jurisdiction, the defendant is foreclosed from arguing the merits. See discussion in Wright, Miller & Cooper, *Federal Practice and Procedure:* § 4430.

Originally, the Air Force strategically elected not to appear in the original proceeding in order to preserve its right to collaterally attack the default judgement. However, when the District of Columbia District Court denied the application, holding that there was personal jurisdiction in the Eastern District of New York, the Air Force shifted strategy. It entered an appearance and filed the Rule 60(b) motion. The Air Force was attempting to simultaneously attack the default judgment directly and collaterally.

However, the courts are in agreement that if the defendant appears and either loses a challenge or fails to make a challenge to the court's personal jurisdiction, a default judgment entered thereafter is res judicata on the issue of personal jurisdiction and the judgment is not subject to . . . collateral attack on that ground." *Moore's Federal Practice* ¶ 55.09, at 55-64 (footnotes omitted). This is due, in large measure, to the principle that a court has jurisdiction to determine its jurisdiction. See *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242 (1963); *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98 (1932) (filing motion to vacate in state court proceedings precluded federal collateral attack); *Baldwin*, 283 U.S. 522, 51 S.Ct. 517 (1931); see also Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3536.

A "court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377, 60 S.Ct. 317, 320 (1940) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 161, 59 S.Ct. 134, 137 (1938)).

This is true even if the jurisdictional decision is erroneous. "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." *Stoll*, 305 U.S. at 172, 59 S.Ct. at 138.

The facts of the instant case are similar to those in *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98. In *American Surety Co. v. Baldwin*, a default judgment was issued by an Idaho State District court against a surety company which had given a supersedeas bond on an appeal to the Supreme court of Idaho. Three days after the entry of the judgment, the surety company filed a motion in that court to vacate and set aside the judgment. The Idaho district court granted the motion to vacate, but the supreme court of Idaho reversed the order vacating the judgment. *Id.* at 162, 53 S.Ct at 100. The surety company then petitioned for a rehearing. The petition was denied without opinion. *Id.* at 163, 53 S.Ct at 100.

The surety company then sought to collaterally attack the enforcement of the Idaho state judgement in federal court. The surety company asserted that since the judgment against it was entered without giving it notice and the opportunity of a hearing on the merits, the judgment was void under the due process clause of the Fourteenth Amendment. *Id.* at 162, 53 S.Ct. at 100. The Court held that the federal remedy was precluded by the proceedings taken in state court. The surety company "was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. But an adequate state remedy was available; and, having invoked that and pursued it to final judgment, the surety company cannot escape the effect of the adjudication there." *Id.* at 164-65, 53 S.Ct at 101 (citations omitted).

See also *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134 (1938) (despite not appearing in initial action, Court reversed state collateral attack of federal bankruptcy judgment's jurisdiction because creditor moved to vacate federal judgment).

As the Court explained in *American Surety Co. v. Baldwin*, the Air Force had the opportunity to remain entirely aloof from the proceedings in the Eastern District of New York and then collaterally attack the default judgment in the District of Columbia on jurisdictional grounds. However, after facing defeat in the D.C. District Court, the Air Force made the deliberate move of entering the Eastern District of New York to challenge the default judgment directly. Having invoked the adequate remedy in the Eastern District, the Rule 60(b) motion to vacate, the Air Force is precluded from pursuing a collateral attack. *Id.*, 287 U.S. at 165, 53 S.Ct. at 101 (motion to vacate and the appeal from the order thereon were effective in conferring jurisdiction for the purpose of determining court's own jurisdiction). Further, it makes no difference that the Air Force instituted the collateral attack prior to making the Rule 60(b) motion to vacate. See *Stoll*, 305 U.S. 165, 59 S.Ct. 134.

A collateral attack on a default judgment is precluded if the party had the opportunity to raise a jurisdictional challenge, but failed to do so. *Chicot County Drainage*, 308 U.S. at 378, 60 S.Ct at 320. It is well settled that "[e]ven if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties could have challenged the court's power to hear a case, then *res judicata* principles serve to bar them from later challenging it collaterally." *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986). This principle was reaffirmed in *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. at 702 n. 9, 102 S.Ct. at 2104 n.9 ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that

question in a collateral attack upon an adverse judgment. It has long been the rule that the principles of res judicata apply to jurisdictional determinations—both subject matter and personal.")

As discussed above, the Air Force waived any objection to personal jurisdiction when it filed its notice of appearance and motion to vacate. It had the opportunity to raise any objection to personal jurisdiction. In denying that application, this Court had determined its own jurisdiction. That decision, which was appealed and affirmed, precluded any collateral attack on jurisdiction. Otherwise, the Air Force would be entitled to more than one bite from the proverbial apple.

Res Judicata

The D.C. Circuit noted in its opinion that "[W]e do not consider whether the Eastern District's ruling might bar the Air Force's attack on personal jurisdiction, for Transaero did not assert any form of preclusion in the District Court for the District of Columbia, and we have generally refused to raise the question *sua sponte*." *Transaero II*, 30 F.2d at 150, n.1 (citations omitted).

However, Transaero could not have raised the issue in the D.C. District Court because at the time the Air Force was legitimately pursuing its collateral attack in the District of Columbia. In other words, at that time there was no ruling from the Eastern District. Only when the Air Force lost in the D.C. District Court did it file the Rule 60(b) motion in the Eastern District of New York. In this situation Professor Moore explains that "[i]n the case in which the judgment that constitutes the basis for a defense of res judicata is entered after judgment in parallel litigation and during the pendency of an appeal, its preclusive effect can be raised by a motion to affirm, or in the briefs." *Moore's Federal Practice* ¶ 0.408[1], at 112 (citing *Cotton States Mutual Insur-*

ance Co. v. Anderson, 749 F.2d 663, 665-66 (11th Cir. 1984) (preclusion issue not waived where it was presented on appeal)). Transaero did in fact argue in its brief, in a letter, and in its petition for rehearing to the D.C. Circuit that the Rule 60(b) proceedings in the Eastern District of New York were dispositive to the matters before the D.C. Circuit. See Combined Reply of Plaintiff Transaero, Inc., at 12-13, n.15 and Addendum B, at 8, n.15. Thus, the Air Force should have been precluded from continuing its collateral attack.

The last decision to be issued in this case was the Second Circuit decision granting the petition for rehearing "only to the limited extent of broadening the remand to include consideration of the cessation of interest . . . ." *Transaero III*, 38 F.3d at 650. "Every Court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." *Stoll*, 305 U.S., at 171-72, 59 S.Ct. at 137 (citing *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29, 37 S.Ct. 492, 493 (1917)). The Second Circuit "declin[ed] to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia." *Transaero III*, 38 F.3d at 650. The Second Circuit remanded the case for this Court to consider only the following three elements in determining the mathematical accuracy of the default award: (1) whether the interest started too early; (2) whether the interest rate exceeded the contract rate; and (3) the proper date for the cessation of interest. Thus, the Second Circuit's affirmation of the denial of the Rule 60(b) motion and its limited remand is preclusive on the issue of jurisdiction.[1]

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[1] Even a third, independent, court would be bound by the Second Circuit decision since a court should give *res judicata* effect to the last previous judgment entered. This

THE AIR FORCE'S MOTION TO STAY NON-JURISDICTIONAL PROCEEDINGS

The Air Force has moved this Court for an order staying all non-jurisdictional proceedings, pending this Court's resolution of the Air Force's motion to vacate the default judgment. The motion is denied.

TRANSAERO'S MOTION TO MODIFY THE JUDGMENT

Transaero moves, pursuant to the mandate from the Second Circuit, for an order "(1) affirming the accuracy of the original calculation of damages upon which the April 28, 1989 Judgment of this Court was based and (2) retroactively increasing the April 28, 1989 Judgment in the amount of $185,014.32, said amount to retroactively accrue interest from that date at the statutory rate for judgments and the new judgment amount being $1,168,710.93 as of April 28, 1989."

The Air Force asserts that it needs discovery relevant to the remanded issue of determining the mathematical accuracy of the default award. We find that the Air Force is entitled to discovery only relative to the limited issues on remand: (1) whether the interest started too early; (2) whether the interest rate exceeded the contract rate; and (3) what was the proper date for the cessation of interest. Transaero is directed to produce its books and records relating to the Air Force account. We direct the Air Force and Transaero to conduct expedited discovery to be completed on or before

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governing rule is often referred to as the "last in time rule." See *Americana Fabrics, inc. v. L & L Textiles*, Inc., 754 F.2d 1524, 1530 (9th Cir. 1985) (citing *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 75-88, 60 S.Ct. 44, 49-50 (1939)); See also Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4404.

September 1, 1995. This Court will then conduct a hearing on these limited issues on Friday, September 15, 1995.

CONCLUSION

The Air Force's motion to vacate the default judgment as void for lack of jurisdiction, pursuant to Fed.R.Civ.P. 60(b), is DENIED. The Air Force's motion to stay non-jurisdictional proceedings is DENIED.

The Air Force and Transaero are ORDERED to conduct expedited discovery on the limited issues of the remand to be completed on or before September 1, 1995. The parties are further ORDERED to appear for a hearing to resolve the issues on remand, on Friday, September 15, 1995. We reserve decision on Transaero's motion to modify the judgment until the hearing has been completed.

And it is SO ORDERED.

/s/ Jacob Mishler
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No: 88-2788

August 22, 1995

TRANSAERO, INC.

Plaintiff,

-against-

LA FUERZA AEREA BOLIVIANA,
an instrumentality of the
REPUBLIC OF BOLIVIA, a Foreign State,

Defendant.

MEMORANDUM OF DECISION AND ORDER

MISCHLER, District Judge

The Air Force of the Republic of Bolivia's Motion for Reconsideration and Motion for Stay of Proceedongs is in all respects DENIED. The Court's direction for discovery is limited to the production by Transaero, Inc. of their relevant records. If during the trial of the issue there is good cause to believe other discovery is appropriate, the Court will consider it at the time.

And it is so ORDERED.

/s/ Jacob Mishler
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No: 88-2788

August 22, 1995

TRANSAERO, INC.

Plaintiff,

-against-

LA FUERZA AEREA BOLIVIANA,
an instrumentality of
THE REPUBLIC OF BOLIVIA, a Foreign State,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE JUDGMENT

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* * * *

After obtaining its default judgment against the Air Force, Transaero waited 38 months before it filed suit in the District of Columbia to enforce its judgment. See Exh. 17. The Air Force moved to dismiss Transaero's complaint for lack of subject matter jurisdiction, arguing that notice was improper under the Foreign Sovereign Immunities Act. 28 U.S.C. § 1602 *et seq.* (1976). In preparing, briefing and

arguing that motion, the Air Force's former counsel made no inquiry at all into the underlying facts. Without benefit of such an inquiry, the District Court denied the Air Force's motion in a written opinion issued on September 25, 1992. See Exh. 18 (district court opinion).[2] In February 1993, the Air Force retained present counsel which undertook -- for the very first time for the Air Force -- an analysis of the underlying facts of the judgment. That investigation revealed the fraud perpetrated on this Court by the Jacobs Affidavit.

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[2] In his opinion, Judge Revercomb made no mention of General Gomez's Affidavit and, in apparent ignorance of that affidavit, stated that "there is no dispute that [the Air Force] received actual notice of Transaero's lawsuit." *Id.* at 2. The Air Force has appealed Judge Revercomb's opinion. See Exh. 19 (notice of appeal). The Air Force acknowledges that until overturned on its pending appeal, Judge Revercomb's opinion bars the Air Force from challenging the propriety of service under the Foreign Sovereign Immunities Act. See *Huron Corp. v. Lincoln Co.*, 312 U.S. 183, 188-89 (1941)(judgment on appeal is still final judgment); *Petrella v. Siegel*, 843 F.2d 87, 90 (2nd Cir. 1988)(judgment pending appeal entitled to res judicata effect); *United States v. NYSCO Laboratories, Inc.*, 318 F.2d 817 (2nd Cir. 1963) (same). Although barred by res judicata from contesting it, the Air Force in no way waives these issues. In this, its first responsive pleading, the Air Force preserves its challenges to Transaero's improper service of process and this Court's lack of personal and subject-matter jurisdiction under the Foreign Sovereign Immunities Act and the United States Constitution.

Respectfully Submitted,

WILLIAMS & CONNOLLY

By: /s/ Timothy S. Driscoll
Gregory B. Craig
James W. Shannon Jr.
Timothy S. Driscoll
TSD 3319

725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Date: May 10, 1993

* * * *

Exhibit 13

DECLARATION OF
GENERAL DARDO GOMEZ GARCIA

I, GENERAL DARDO GOMEZ GARCIA, under penalty of perjury under the laws of the United States of America, declare:

1. I am a Commanding General of Fuerza Aérea Boliviana (the "Bolivian Air Force") and am personally familiar with the duties, functions, structure an authority of the Bolivian Air Force. All factual statements contained herein are based upon my own personal knowledge.

2. The Constitution of the Republic of Bolivia provides for the establishment of a military defense force. The Bolivian Air Force was established pursuant to the Constitution.

3. The Bolivian Air Force is a branch of the military defense forces of the Republic of Bolivia and is an integral part of the Republic of Bolivia's political structure.

4. The primary function of the Bolivian Air Force is to provide for the defense of the borders, air space and sovereignty of the Republic of Bolivia.

5. The structure and principal function of the Bolivian Air Force is national defense and not commercial in nature.

6. The Bolivian Air Force exists by virtue of the Republic of Bolivia an any presence outside the Republic of Bolivia is at the express direction and control of the Republic of Bolivia.

7. The Bolivian Air Force maintains an office in the District of Columbia. The office is located in the Bolivian Embassy and is staffed exclusively with active-duty Bolivian Air Force officers on two year assignments from Bolivia, Bolivian Air Force officers on assignment in the United States are treated as diplomatic agents and report directly to the Bolivian Ambassador and the Head of the Bolivian Air Force.

8. All contracts negotiated between the Bolivian Air Force and any private entity such as Transaero, Inc. are at the express direction of the Bolivian Air Force itself.

9. The Bolivian Air Force purchased certain parts and material from Transaero, Inc. in 1981 and 1982.

10. No special agreement exists between the Bolivian Air Force and Transaero, Inc. for service of process or any judicial documents nor do any such arrangements exist between the Republic of Bolivia and Transaero, Inc.

11. Prior to February 28, 1992, the Bolivian Air Force was not aware that an action had been filed by Transaero, Inc. or that a Default Judgment had been entered on April

21, 1989 in the United States District court for the Eastern District of New York.

12. Furthermore, the Bolivian Air Force was not served with either the Garnishment Summons dated February 19, 1992 in the instant proceedings nor with a Spanish translation of the Garnishment Summons.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on March 30, 1992

/s/ Dardo Gomez Garcia
General Dardo Gomez Garcia
LA FUERZA AEREA BOLIVIANA
LA PAZ — BOLIVIA

APPENDIX F

STATUTES INVOLVED

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other

ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter regatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.